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No. 86-1368

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

JIN K. LEE,

Petitioner,

v.

JAMES H. WEBB, SECRETARY OF THE NAVY,

Respondent.

REPLY BRIEF ON BEHALF OF PETITIONER TO BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Petitioner, JIN K. LEE, replies herein to respondent's brief filed in opposition to the petition for writ of certiorari.

The gravamen of respondent's opposition is that contrary to petitioner's argument, the decision of the Ninth Circuit Court of Appeals below does not conflict with any decisions of this Court or of any other federal circuit. (Respondent's Brief at 4).

Respondent's position is wholly devoid of merit. It is premised on persuading this Court that the Ninth Circuit's reference to the applicable Eleventh Circuit decisions is mere dicta. (Respondent's Brief at 6)

In proffering this argument, respondent ignores that the Ninth Circuit specifically declined to adopt

the Eleventh Circuit rule which appropriately removes petitioner's case from the traditional *McDonnell-Douglas* formula. (Appendix C of the Petition for Writ of Certiorari at 10a)

Respondent argues that the record below is bereft of any evidence to support a discriminatory motive on the part of respondent. This conclusion is truly ingenious in light of the unrebutted trial testimony of petitioner and eyewitness Finley who corroborated that Morris made the "Chinaman's chance" slur in the latter's presence. Moreover, the statement's racially disparaging meaning and context, in light of the speaker's control over petitioner's promotional opportunities, were abundantly clear to both petitioner and this eyewitness.

Respondent urges that "the circumstances necessary to trigger the Eleventh Circuit rule" were not present in petitioner's case. (Respondent's Brief at 6) Respondent states that the racial references by Morris, petitioner's supervisor, were initially taken by petitioner as a joke, and not accepted by the district court as direct evidence of discriminatory motive in the promotion process. (*Ibid.*) That is, the evidence of racial animus introduced by petitioner simply did not rise to the evidence required to remove the case from the *McDonnell-Douglas* proof modality.

The record itself dispels the notion that petitioner dismissed Morris' clearly discriminatory state of mind as mere humor. Petitioner unequivocally testified on cross-examination that he did not take Morris' "Chinaman's chance" statement as a joke, and that he interpreted the statement to mean that he had no chance whatsoever to earn a promotion.

Respondent persists in disregarding this racial animus as direct evidence of an employer's discriminatory motive in refusing to promote a member of a protected class. The fact that the speaker of the racially derogatory statement was a member of the rating and ranking panel who may not have individually rated petitioner lower is irrelevant. The perils of subjective employment processes are well-known. Petitioner was entitled to be evaluated by a panel entirely uninfluenced by any discriminatory motive. Any defect in the evaluation process, regardless of the motivating actor, deprived petitioner of fair and equal treatment under the protections of Title VII.

Respondent artfully dodges this direct evidence of discrimination, sufficient to impose the Eleventh Circuit's reasoning in such recent cases as *Wilson v. City of Aliceville*, 779 F.2d 631 (11th Cir. 1986); and *Thompkins v. Morris Brown College*, 752 F.2d 558 (11th Cir. 1985). There, the Court of Appeals held that where such direct evidence of discrimination is present, the *McDonnell-Douglas* formula does not apply.

Here, as in *Wilson* and *Thompkins*, the derogatory statement directed at the employee by the employer is compelling direct evidence of discrimination. It is further significant that respondent below offered no evidence or testimony whatsoever to refute or even explain the "Chinaman's chance" slur. In the absence of such a rebuttal, this direct evidence of racial animus was more than sufficient to meet the requisite showing under the Eleventh Circuit's precedent holding that such evidence successfully rebutted respondent's proffered articulation for its employment decision.

The question presented in this petition is an extremely critical one which yearns for clarification from this Court. This particular case demonstrates that the federal circuits are confused and in conflict as to the applicable proof modality when compelling evidence of direct discriminatory motive exists.

It is precisely the trier-of-fact's failure to accept the direct evidence admitted at trial as establishing discriminatory motive that petitioner appeals. The Ninth Circuit's refusal to adopt the Eleventh Circuit's approach to such cases is not mere dicta precluding review by this Court. Rather, the Ninth Circuit's decision declining to adopt another circuit's proven and consistently upheld formula demonstrates the need for this Court to provide direction for future cases. Accordingly, petitioner respectfully submits that the writ prayed for should issue.

Respectfully submitted,

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May 13, 1987